

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Charles W. Penland, Sr. and
Mary Penland,

Plaintiffs,

vs.

United States District Court, at
Greenville, South Carolina, and
Jerry Saad, Court Appointed Receiver,
in Criminal Case 7:05-710,

Defendants.

C.A. No. 6:07-3284-HMH

OPINION & ORDER

This matter is before the court on remand from the United States Court of Appeals for the Fourth Circuit.

The Plaintiffs filed the instant case on September 28, 2007, and assert various claims arising from the forfeiture of certain properties in connection with Charles W. Penland, Sr.'s ("Penland") criminal case, United States v. Charles W. Penland, Cr. No. 7:05-710-HFF. Specifically, in the complaint, the Plaintiffs state that they are seeking removal of tax liens and damages. The Plaintiffs allege: (1) the court made no accounting of the forfeited properties; (2) the court made no accounting of the non-forfeited properties, which were in the care of the court-appointed Receiver; and (3) Judge Henry F. Floyd, Jr. committed a constitutional violation by taking Penco, Inc., which actually belonged to Mary Penland. The Plaintiffs contend that the Receiver paid \$200,000 of non-forfeited funds to defend lawsuits against Penco, Inc., and formed corporations. The Plaintiffs also allege that the Receiver, counsel of record for Penland, and the prosecutors conspired to violate the Plaintiffs' rights and take their property.

This case was originally assigned to United States District Judge Henry F. Floyd, Jr. On October 18, 2007, Magistrate Judge William M. Catoe entered a Report and Recommendation recommending dismissing the case without prejudice and without issuance and service of process. In addition, the Magistrate Judge recommended deeming the action a “strike” against Penland pursuant to the “three strikes” rule of 28 U.S.C. § 1915(g). Penland filed objections to the Report and Recommendation on October 29, 2007.

On October 31, 2007, Judge Floyd entered an order adopting the Report and Recommendation of the Magistrate Judge, dismissing the case without prejudice and without issuance and service of process, and deeming the action a “strike” against Penland pursuant to § 1915(g). In addition, the order granted Penland’s motion to add the Acting Commissioner of the Internal Revenue Service (“the Commissioner”) as a defendant, but dismissed the claim against the Commissioner. On November 1, 2007, Judge Floyd signed an amended order with the same holdings (“the November Order”) and entered judgment against the Plaintiffs.

The Plaintiffs filed a notice of appeal of the November Order on November 19, 2007. Subsequently, on January 9, 2008, Mary Penland filed a motion to void the forfeiture and stipulation agreement.

The Fourth Circuit remanded the instant case on July 10, 2008, for further proceedings without making any substantive ruling on the Plaintiffs’ appeal. On July 22, 2008, the case was re-assigned to United States District Judge Henry M. Herlong, Jr. The Fourth Circuit’s mandate issued on August 1, 2008.

After review of the Report and Recommendation and the November Order, and for the reasons set forth therein, the court agrees with Judge Floyd’s November Order adopting the

Report and Recommendation of the Magistrate Judge and dismissing the instant case without prejudice and without issuance and service of process. Accordingly, the court also dismisses Mary Penland's motion to void the forfeiture and stipulation agreement as moot.

It is therefore

ORDERED that the Plaintiffs' complaint is dismissed without prejudice and without issuance and service of process. It is further

ORDERED that the instant action is deemed a "strike" against Charles W. Penland, Jr. pursuant to 28 U.S.C. § 1915(g). It is further

ORDERED that Mary Penland's motion to set aside the forfeiture and stipulation agreement, docket number 27, is dismissed as moot.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
United States District Judge

Greenville, South Carolina
August 5, 2008

NOTICE OF RIGHT TO APPEAL

The Plaintiffs are hereby notified that they have the right to appeal this order within sixty (60) days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.